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HAROLD B. WILLE

IN THE

Supreme Court of the United States

October Term, 1953

No. 748

E. MERL YOUNG,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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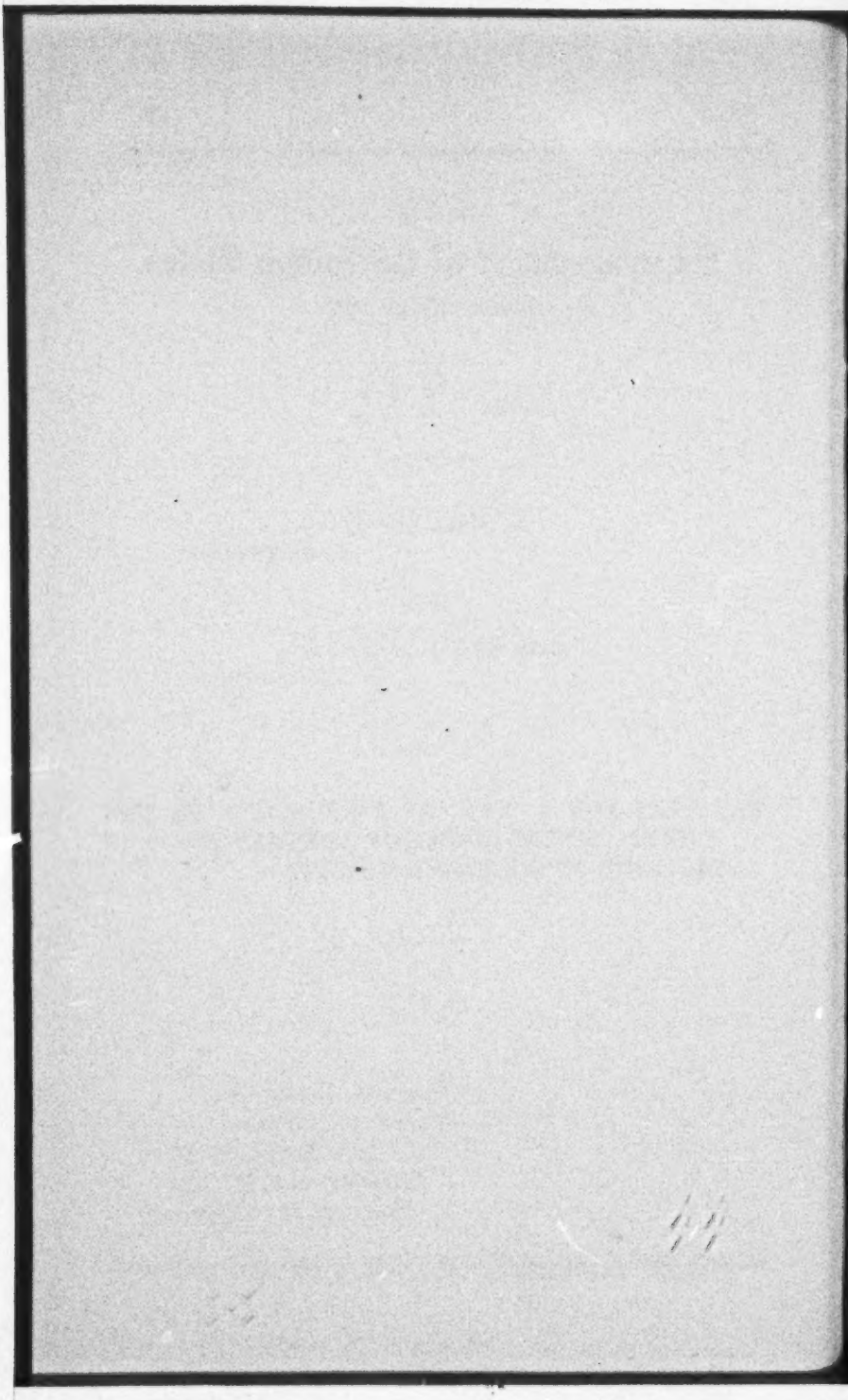

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In The

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No. _____

E. Merl Young,

Petitioner

v.

United States of America,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The petitioner, appellant below, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered on April 8, 1954.

OPINION BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit is set forth on page 38, et seq. of the record. It has not yet been officially reported.

JURISDICTION

The judgment of the Court of Appeals was entered April 8, 1954 (R. 48). The jurisdiction of this Court is invoked under *28 USC 1254, (1). F. R. Cr. P. 37 (b), 2.*

QUESTIONS PRESENTED

1. Whether the intentional and systematic exclusion from the jury list of all residents of the District of Columbia who voted outside of the District of Columbia, invalidated the panel which returned the indictment herein involved.[1]

2. In a case where the defendant was subpoenaed before the Grand Jury, which found the indictment herein, was it prejudicial error for the prosecutor to comment in his closing argument that the defendant's explanation before the Grand Jury had made no impression on that body, and thus, in effect, argue that an indictment is evidence of guilt.

STATUTES INVOLVED

Title 11, Section 1417, D. C. Code (1951):

> "No person shall be competent to act as a juror unless he be a citizen of the United States, a resident of the District of Columbia, over twenty-one and under sixty-five years of age, able to read and write and to understand the English language, and a good and lawful person, who has never been convicted of a felony or a misdemeanor involving moral turpitude."

Title 11, Section 1430, D. C. Code (1951) provides that certain persons (not here material)

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[1] The Court below characterized the practice as "certainly erroneous." (R. 40).

"* * * shall be exempt from jury duty, and their names shall not be placed on the jury lists. * * * All other persons otherwise qualified according to law * * * shall be qualified to serve as jurors in the District of Columbia and *shall not be exempt from such service.*" (Italics supplied)

STATEMENT OF THE CASE

Petitioner was indicted for perjury before a Senate subcommittee and the Grand Jury (R. 10A). Nine weeks prior to the trial, which began on March 23, 1953, and within the time prescribed by the *Federal Rules of Criminal Procedure 12 (b) (3)*, he requested permission to file a motion to dismiss the indictment and each count thereof (R. 23A), on the ground that qualified jurors had been excluded from the jury list from which the Grand Jury returning the instant indictment was selected. The motion alleged that residents of the District of Columbia who voted elsewhere were systematically excluded from jury service. The motion charged that the panel did not represent a cross-section of the community and was selected in contravention of the statute. (R. 25A).

The trial court denied the motion, without opinion (R. 26A). The Court below decided the question on the merits, holding:

> "The jury commissioners excluded from the jury list all persons who voted outside the District of Columbia, on the ground that they could not be 'residents' of the District of Columbia. This practice, which has since been discontinued, was certainly erroneous. (cases cited). The question is whether it warrants reversal." (R. 40)

The Court held it did not, lacking a showing of prejudice (R. 41, note 5).

The second point presented herein by petitioner challenges the prosecutor's closing argument to the jury. He said:

(Tr. 1008-1010)[1]

"The Grand Jury, in conclusion, ladies and gentlemen, they didn't believe him when they said he had nothing to do with these Lustron applications. Of course the indictment means nothing. That is just a charge. It is a means whereby he is brought into court.

"But the fact remains that his denial there made no impression on the Grand Jury. His denials about the other things made no impression on the Grand Jury. I submit to you, ladies and gentlemen, that while they put on quite a lot of ballyhoo here, the simple facts are that this man falsified his testimony in both places, and that he intentionally did so, and that therefore your verdict should be guilty.

"I ask you ladies and gentlemen to go out and consider the case carefully, and bring back into this court such verdict as you think speaks the truth.

"Thank you.

"MR. REILLY: If the Court please, I would like to make one observation to the Court about the statement made by counsel.

"THE COURT: Come to the bench, please.

(At the bench:)

"MR. REILLY: Comment made by counsel for the government to the effect that the Grand Jury didn't believe him was entirely improper. It wasn't based on anything that I said; it wasn't an answer to anything said by the defendant. There is nothing in the record to indicate that that was in the evidence in any manner whatsoever. It should be disregarded.

"THE COURT: I don't know whether it was in the evidence or not, but I assume that his remark was directed to the fact that the indictment was returned even after he testified before the Grand Jury. I assume that is what it was.

"MR. PAISLEY: That is right. He was questioned before the Grand Jury. The jury knows it. It is in evidence.

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[1] The reference is to the original record filed herein. Petitioner's finances did not permit a reprint. The present quotation is all that is necessary to an understanding of the point involved.

"THE COURT: I will cover that.
"MR. REILLY: I think that was highly improper and for that reason I move for a mis-trial."

The court did not grant the motion. It did charge that an indictment is not evidence or proof but made no specific reference to the prosecution's argument (Tr. 1013).[1]

The prosecutor's erroneous argument was aggravated by a similar transgression earlier in his argument when he said:

> "They tried to deceive the committee, tried to deceive the grand jury, they have tried to deceive you, but they are not going to get away with it in my judgment." (Tr. 996, 997)

To this, no objection was made; but when repeated, objection was made as above set forth with appropriate motion for mistrial. (Tr. 1010)

The Court below in passing upon this contention of petioner said: (R. 47)

> "Finally, appellant complains of several of the questions asked and remarks made at the trial by the prosecutor. We have studied the record as to these incidents. We do not believe they warrant a new trial, and hence do not deem it necessary to detail them here."

REASONS FOR GRANTING THE WRIT

The opinion of the Court below on point one presented herein is contrary to the applicable decisions of this Court as announced in *Ballard v. United States, 329 U. S. 187, 195*, and at variance with the decision of the Circuit Court of Appeals for the Third Circuit in *Dow v. United States Steel Corporation, 195 F. 2nd. 476*, as well as the United States District Court for Iowa in *United States v. Roemig, 52 F. S. 857, 862*, which was quoted with approval in

[1] See footnote page 4.

Ballard v. United States, supra. It is likewise impliedly at variance with this Court's decision in *Hernandez v. Texas* U.S. S. Ct.) No. 406 decided May 3, 1954.

On point two presented herein, the Court below has not given proper effect to the decision of this Court in *Berger v. United States, 295 U. S. 78, 88,* enjoining prosecutors from unfair conduct in criminal cases. A jury should not be told to reject the testimony and disbelieve the defendant because the Grand Jury did not believe him, particularly when the Grand Jury proceedings were not in evidence. If the present conduct is sustained as proper no one would be inclined to testify before a Grand Jury. An important question of public policy is thus involved.

ARGUMENT

I

The Decision Below is Contrary to the Decisions of This Court and in Conflict With the Decision of the United States Court of Appeals for the Third Circuit.

The Grand Jury was improperly selected. The Court below so held. However, it stated the error did not warrant reversal (R. 41). Statutory directions for the selection of juries should be followed. Only in doing so is a cross-section of the community obtained for jury service. Such is the purpose of the statutes. Inasmuch as the statute prescribing the manner in which the Grand Jury shall be selected was not followed, the indictment by the Grand Jury so impaneled was void. Observance of procedural regularities is mandatory. cf. *McNabb v. United States, 318 U. S. 332, 347.*

Improper, systematic and intentional exclusion of qualified jurors has been condemned by this Court in:

Ballard v. U. S., 329 U. S. 187, 195, 91 L. Ed. 181.
Glasser v. U. S., 315 U. S. 60, 86 L. Ed. 680, 62 S. Ct. 457.
Hernandez v. Texas U.S. S. Ct. No. 406 decided May 3, 1954.

Thiel v. Southern Pacific, 328 U. S. 217, 90 L. Ed. 1181, 66 S. Ct. 984, 166 A. L. R. 1412.

Cassell v. Texas, 339 U. S. 282, 94 L. Ed. 839, 70 S. Ct. 629.

In *Ballard v. United States, 329 U. S. 187, 91 L. Ed. 181, 67 S. Ct. 261,* this Court dealt with an indictment returned in a Federal Court by a grand jury from which women had been intentionally and systematically excluded. This Court reversed the conviction and said:

Pages 195-196

> "The evil lies in the admitted exclusion of an eligible class or group in the community in disregard of the prescribed standards of jury selection. The systematic and intentional exclusion of women, like the exclusion of a racial group, *Smith v. Texas, 311 U. S. 128, 85 L. Ed. 84, 61 S. Ct. 164,* or an economic or social class, *Thiel v. Southern P. Co., 328 U. S. 217, 90 L. Ed. 1181, 66 S. Ct. 984, 166 A. L. R. 1412,* supra, deprives the jury system of the broad base it was designed by Congress to have in our democratic society. It is a departure from the statutory scheme.
>
> • • • •
>
> "If, as in the Thiel Case, we had merely an instance of a petit jury drawn from an improper panel, we would remand the cause for a new trial. But, as we have said, the grand jury was likewise drawn from a panel improperly chosen and therefore the indictment was not returned in accordance with the procedure established by Congress. Accordingly, the indictment must be dismissed."

The instant indictment was drawn in a manner contrary to the procedure established by Congress. The numerous residents of the District of Columbia who voted elsewhere were systematically and deliberately excluded from the panel. Under the doctrine of *Ballard v. U. S., supra,* the indictment must be dismissed.

The decision below is in conflict with *Dow v. United States Steel Corporation (CCA 3rd), 195 F. 2nd. 478.* There, the plaintiff, in a civil action, moved to strike the jury panel on the ground that the selection of jury panels did not comply with the law. The plaintiff challenged the selection because the jury list excluded foreign born citizens, veterans, labor people, negroes and many others. The Court vacated the proceedings and sustained the defendant's motion to challenge the "array." The Court said: (page 480)

> "The federal statutes having to do with juries do not give many mandatory directions for compiling lists of prospective jurors."

The reversal directed the lower court to ascertain if the jury was selected contrary to the statute; and if so, to award a new trial.

Exclusion of those residents of the District of Columbia who vote elsewhere by the systematic exclusion of their names from the jury list is illegal for the elementary reason that the Grand Jury was not organized as prescribed by the statute. The Court below said the practice was "certainly erroneous." It held, however, that the group excluded must be a cohesive group, and that residents of the District of Columbia who vote elsewhere were not a cohesive group.

Jury competence is an individual rather than a group or class matter. *Thiel v. Southern Pacific Co., 328 U. S. 217, 220.* It can hardly be said that those excluded in the *Thiel* case such as wage earners, whether men or women, miners, longshoremen, lumbermen, electricians, seamstresses, waitresses, department store employees, or the many other variations of the callings of those who work for wages, are any more a cohesive group than those of all occupations, whether in government or in private industry, who work and live in the District of Columbia but vote in their home state.

This Court can take judicial notice that many, many government employees and others in private enterprise reside in the District of Columbia and vote in their home state. They comprise a substantial portion of the population of the District of Columbia. They secure the benefits of local government. They constitute a cross-section of the community and participate in the social, civic, religious and other activities of the area. They are a group of people constituted no differently in an economic, social, religious, political or geographical sense than those excluded from jury service in *Thiel v. Southern Pacific Co., supra.* Their exclusion from jury lists renders the panel from which the grand jurors were selected unrepresentative of the community. Hence the indictment was fatally defective. *Ballard v. U. S., supra.*

A cohesive group is one held together by a common bond or union, but it could hardly be said that all of a certain race or religion are a cohesive group in any manner except their color or belief. Members of a labor union, veterans organization, political or professional associations are not a cohesive group except in their one common enterprise.

We submit that the decisions of this Court compel the jury commission of the District of Columbia to comply with the mandate of the statute in the selection of jurors. A large section of the populace must not be excluded because they are or are not a cohesive group.

It was not necessary to determine whether petitioner was in any way prejudiced by the wrongful exclusion of a class of residents from the panel. cf. *Thiel v. United States, 328 U. S. 217, 225,* and cases there cited.[1] See also this Court's recent decision in *Hernandez v. Texas* No.

[1] The Court below (R. 41, note 5) stated its conclusion might be different if prejudice was alleged and proved. Petitioner has no way of knowing whether he was prejudiced. Compliance with the statute in the selection of jurors was the way Congress sought to avoid prejudice.

406 May 3, 1954, wherein this Court repudiated any requirement of proof of prejudice stating that the defendants sole claim was his right "to be indicted and tried by juries * * * selected from among *all* qualified persons * * *" (Italics ours)

In *United States v. Roemig, 52 F. S. 857, 862 (D. C. Iowa N.D.)*, quoted with approval by this Court in *Ballard v. United States, 329 U. S. 187, 195*, the Court said that where one had been indicted by a Grand Jury selected contrary to law, the indictment must fail without proof of injury to the defendant. There, the Court said that the inquiry is whether the defendant has been indicted by a Grand Jury selected as he had the right under the law to expect and require it to be selected. If that inquiry was answered negatively, said the Court, the indictment ought to fail without requiring proof of injury.

Furthermore, when the Court declined to permit the instant motion to be filed (R. 4A), the petitioner was denied an opportunity to show prejudice, if it was necessary to be shown. This was contrary to the decision of the Third Circuit in *Dow v. United States Steel Corporation, 195 F. 2nd. 478.*

This Court said in *Glasser v. United States, 315 U. S. 60, 86:*

> "Tendencies, no matter how slight, toward the selection of jurors by any method other than a process which will insure a trial by a representative group are undermining processes weakening the institution of jury trial, and should be sturdily resisted. That the motives influencing such tendencies may be of the best must not blind us to the dangers of allowing any encroachment whatsoever on this essential right. Steps innocently taken may one by one lead to the irretrievable impairment of substantial liberties."

II

THE CLOSING ARGUMENT OF THE PROSECUTOR COMMENTING UPON THE INDICTMENT AS EVIDENCE WAS ERROR:

Petitioner had been subpoenaed to appear before the Grand Jury investigating the facts developed before the Senate Subcommittee on Banking and Currency while that body was conducting a hearing and study of the operations of the Reconstruction Finance Corporation. During the sessions of the Grand Jury, he answered questions propounded to him relative to his testimony before the committee. He was indicted for perjury alleged to have been committed before the committee and the Grand Jury. The prosecutor in his closing argument stated that petitioner's denial of guilt before the Grand Jury made no impression upon it. This, in effect, was an argument that the indictment was evidence; it erroneously assumes the Grand Jury is a trier of facts, which it is not; it converts a criminal case into two trials instead of one and makes the first trial evidence in the second. We submit:

(a) It violated the rule that the indictment can never constitute in any respect proof of the offense.
(b) It transgressed the rule that the presumption of innocence continues at all times during the trial.
(c) It constituted an unlawful method of attacking the credibility of the defendant.
(d) It was based upon the Grand Jury proceedings which were not in evidence and proffered issues which the defendant could not meet without trying collateral matters.

Not only is the indictment not evidence (*Cooper v. U. S., 9 F. 2nd. 216, 226 (CCA 8th); U. S. v. Schanerman, 150 F. 2nd. 941, 945 (CCA 3rd); Nanfito v. U. S., 20 F. 2nd., 376, 378, 379 (CCA 8th); Patterson v. U. S., 183 F. 2nd. 687, 690 (CCA 5th)*), but the legislature is powerless

to make it so *(Tot v. U. S., 319 U. S. 463, 469, 87 L. Ed. 1519, 1525)*.

In *Patterson v. U. S., supra*, the conviction was reversed because the Court instructed the jury that the indictment was no evidence of guilt but went on to say: (page 690)

> "It has no further force or vitality until it is substantiated by competent evidence."

The Court in reversing said: (page 690)

> "It is clear that the appellant was correct in his contention that an indictment in and of itself is never evidence of the guilt of the accused and an inference to the contrary having been created by the charge, the appellant was entitled to have the court formulate a correct instruction that would meet defendant's objection."

In the present case, the prosecution's argument conceded that the indictment was only a charge; but, at the same time, utilized the fact of the indictment as an argument for conviction by the device of claiming the Grand Jury, in finding the indictment, had obviously refused to believe the defendant's testimony before it. It follows, therefore, that the prosecution drew strength for conviction from the fact of the indictment.

The presumption of innocence attends the accused at all times *(U. S. v. Fleischman, 339 U. S. 349-363, 94 L. Ed. 906, 915; Curley v. U. S., 160 F. 2nd. 229 (D. C. Cir.))*. Any utilization of the indictment, either as proof or as the basis of an attack upon the credibility of the defendant transgresses this rule. The vice is that an inference from a mere charge (i.e., alleged Grand Jury disbelief of his explanation) is made the basis for an argument that the defendant's testimony at his trial is false.

The prosecution's argument is an unlawful attack upon the credibility of the defendant. The prosecution's sequence is as follows:

1. The defendant testified before the Grand Jury.
2. The Grand Jury indicted the defendant.
3. Hence, the Grand Jury did not believe the defendant, and therefore the trial jury should not believe the defendant.

The unsoundness of this argument is apparent. The trial jury must try the defendant upon the evidence produced before it, not evidence unknown as to quantum, source or reliability, which may have been produced before the Grand Jury.

The evidence developed before the Grand Jury was, of course, produced by witnesses who did not confront the defendant as the Constitution requires. *Amendment VI, U. S. Constitution.*

The prosecution's illogical argument is that because a group of people on a different occasion and upon testimony which was not before the trial jury did not believe the defendant, the trial jury should refuse to believe him. This argument transgresses all known rules covering attacks upon credibility of witnesses. A defendant may be impeached by showing a contradictory statement upon a prior occasion *(3 Wigmore Evidence (3rd. Ed.) 1940, Sections 902, 1017)*, but this rule is clearly inapplicable to the present case. The prosecution does not claim the defendant testified differently before the Grand Jury. The sole reflection upon his testimony is that the Grand Jury did not believe him. That the Grand Jury found a charge against him is even less ground for impeachment. A witness cannot be impeached by showing a charge of crime; a conviction is necessary. *(3 Wigmore Evidence, (3rd Ed.) 1940 Section 980, 980A).*

The argument violates the rule that a witness cannot be impeached by matters which would require a collateral inquiry. Veracity cannot be attacked by showing that another or others did not believe the defendant on a prior occasion. Only his reputation for veracity is admissible.

(3 Wigmore Evidence (3rd. Ed.) 1940 (Sects. 923, 924;) cf. Sect. 1608).

The prosecution's argument, coming at the very close of the case, was utterly untenable and unfair. Its effect upon the jury can readily be visualized. No more telling argument could be made than to claim that inasmuch as the Grand Jury refused to believe the defendant, the trial jury should likewise refuse to believe him. The prosecution's argument, which to trained legal minds is a *non sequitur*, might shape up to a jury as the soundest logic. Its effect should be estimated in the light of the prosecutor's prior statement:

> "They tried to deceive the Committee, tried to deceive the Grand Jury, they have tried to deceive you, but they are not going to get away with it in my judgment." (Tr. 996-997)[1]

The prosecutor's argument falls within the ambit of conduct condemned by this Court in *Viereck v. U. S., 318, U. S. 236, 247, 87 L. Ed. 734, 741,* and *Berger v. U. S. 295 U. S. 78, 88, 79 L. Ed. 1314, 1321.*

CONCLUSION

It is respectfully submitted the writ of certiorari herein prayed for should be granted.

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[1] See footnote page 4.

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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 748

E. MERL YOUNG, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 38-47) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on April 8, 1954 (R. 48). The petition for a writ of certiorari was filed on May 6, 1954. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether the exclusion from the jury lists for the District of Columbia of persons who lived in, but voted outside of, the District, on the ground that such persons were not "residents" of the District, invalidates an indictment returned by a grand jury drawn from such lists.

2. Whether, in view of the fact that it had been brought out during the trial that petitioner had told his story before the grand jury and in view of the fact that the trial court carefully pointed out to the jury the difference between the functions of the grand and petit juries, it was reversible error for the prosecutor to comment in his closing argument before the trial jury that the grand jury had not believed petitioner.

STATUTE AND RULES INVOLVED

Title 11, District of Columbia Code, Section 1417, provides that:

> No person shall be competent to act as a juror unless he be a citizen of the United States, a resident of the District of Columbia, over twenty-one and under sixty-five years of age, able to read and write and to understand the English language, and a good and lawful person, who has never been convicted of a felony or a misdemeanor involving moral turpitude.

Rule 12(b) of the Federal Rules of Criminal Procedure provides, in relevant part:

> (2) *Defenses and Objections Which Must be Raised.* Defenses and objections based on

defects in the institution of the prosecution or in the indictment or information other than that it fails to show jurisdiction in the court or to charge an offense may be raised only by motion before trial. The motion shall include all such defenses and objections then available to the defendant. Failure to present any such defense or objection as herein provided constitutes a waiver thereof, but the court for cause shown may grant relief from the waiver. Lack of jurisdiction or the failure of the indictment or information to charge an offense shall be noticed by the court at any time during the pendency of the proceeding.

(3) *Time of Making Motion.* The motion shall be made before the plea is entered, but the court may permit it to be made within a reasonable time thereafter.

Rule 92 of the Rules of the District Court for the District of Columbia provides:

> Motions under Rule 12 and 41(e) of the Federal Rules of Criminal Procedure shall be made either before a plea is entered or within ten days after arraignment, unless the Court extends the time either at arraignment or on written application made within the said ten day period. Such application shall set forth the grounds upon which it is made and shall be served on the United States Attorney.

STATEMENT

Petitioner was convicted on four counts of perjury before a committee of the United States Senate and before a grand jury of the District Court

for the District of Columbia and sentenced to a term of four months to two years on each count, the sentences to run concurrently (R. 33). On appeal to the Court of Appeals for the District of Columbia Circuit, the judgment was affirmed (R. 48).

The facts, so far as relevant to the issues presented by the petition for certiorari, are as follows:

The indictment of petitioner was returned on February 28, 1952 (R. 2). He was arraigned and pleaded not guilty on March 14, 1952 (R. 2). On April 3, 1952, and later, on May 14, 1952, petitioner filed motions to dismiss the indictment, the grounds of which included a charge that the grand jury was not constituted in accordance with law because the jury commissioners had been improperly selected and because they had not taken the required oath of office. (R. 3, 17). These motions were denied on December 23, 1952 (R. 23). Later, on January 2, 1953, and still some nine weeks before trial, petitioner filed a "Motion for Leave to File Second Supplemental Motion to Dismiss." The motion was based on the contention that the grand jury was illegal and void because the jury commission construed the requirement of the District of Columbia Code that jurors must be residents of the District to exclude all those who voted outside of the District (R. 23-26). The motion was denied (R. 26).

The trial commenced on March 23, 1953, and the verdict was returned on March 31. At the end of

his closing argument to the jury, the prosecutor made the following statement (Tr. 1008):

> The Grand Jury, in conclusion, ladies and gentlemen, they didn't believe him when they said he had nothing to do with these Lustron applications. Of course the indictment means nothing. That is just a charge. It is a means whereby he is brought into court.
>
> But the fact remains that his denial there made no impression on the Grand Jury. I submit to you, ladies and gentlemen, that while they put on quite a lot of ballyhoo here, the simple facts are that this man falsified his testimony in both places, and that he intentionally did so, and that therefore your verdict should be guilty.

Immediate objection was made that this was "highly improper," and a motion for mistrial was made (Tr. 1010). The court did not grant the motion, but opened its charge by explaining to the jury at considerable length the respective functions of the grand and petit jurors (Tr. 1011-1014, see also Tr. 1023), specifically pointing out that an indictment "is not proof, it is not evidence, it can never take the place of proof or evidence and you are so instructed" (Tr. 1013). The jury returned a verdict of guilty on all counts (R. 6).

ARGUMENT

1. Petitioner first contends that the grand jury which indicted him was improperly selected because the jury commission intentionally excluded from the lists of jurors those who voted outside the

District of Columbia. This appears to have been done on the jury commissioner's theory that persons who voted outside the District were not residents of the District within the meaning of section 1417 of the District of Columbia Code requiring jurors to be residents (See R. 40). Petitioner argues that this vitiated the indictment on the same theory that this Court has held invalid indictments returned by grand juries from which Mexicans, women, Negroes, and wage earners have been intentionally excluded. *Hernandez* v. *Texas*, No. 406, O. T. 1953, decided May 3, 1954; *Ballard* v. *United States*, 329 U. S. 187; *Cassell* v. *Texas*, 339 U. S. 282; *Thiel* v. *Southern Pacific Ry.*, 328 U. S. 217.

Those cases are not applicable to the present context. The *Hernandez* case states the basic issue (slip opinion, p. 3):

> Throughout our history differences in race and color have defined easily identifiable groups which have at times required the aid of the courts in securing equal treatment under the laws. But community prejudices are not static, and from time to time other differences from the community norm may define other groups which need the same protection. Whether such a group exists within a community is a question of fact. When the existence of a distinct class is demonstrated, and it is further shown that the laws, as written or as applied, single out that class for different treatment not based on some reasonable classification, the guarantees of the Constitution have been violated. * * *

It is clear that the petitioner here has not met what the *Hernandez* case, *supra*, calls the initial burden, *i.e.*, proof that persons who live in the District of Columbia, but vote outside of it, constitute a separate class distinct from those who live in the District, but do not vote outside of it. Cf. *Hernandez* v. *Texas*, slip opinion, pp. 4-5. Petitioner has not shown that any such separation exists in the District of Columbia, and, we submit, the Court can properly take judicial notice of the fact that it very clearly does not. Stated differently, it is clear that the presence or absence on juries of persons who live in, but vote outside of, the District would make no difference in the character of juries or their deliberations, and this would be so whether or not the matter involved those who voted outside the District.

Moreover, it appears that the basis for the exclusion from the jury rolls of those who voted elsewhere was the belief that such persons were not residents. This was a legal conclusion based upon a statutory qualification for jury service and affected all "nonresidents" alike, regardless of their place in local society. It was not a systematic exclusion based upon distinctions of sex, race, or national origin, or in the social or economic station of those excluded. Nor was there a purpose to exclude voters *qua* voters; rather the exclusion was based upon an erroneous interpretation of the requirement of residence.[1] Consequently, this kind

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[1] The Court of Appeals pointed out that this erroneous practice has been discontinued (R. 40).

of exclusion has a considerably different purpose and impact from suggestions by jury commissioners that they knew no qualified jurors of a certain group. Cf. *Cassell* v. *Texas*, *supra*.

Thus, the whole basis for striking down indictments returned by grand juries selected by deliberate exclusion of wage earners or women or disadvantaged racial groups is lacking. For those cases involve distinct groups which are in important ways treated differently, usually less favorably, only because they are distinct groups.[2]

Even if it were assumed that there were some merit to petitioner's challenge to the grand jury array, it still would not be so fundamental an error as to justify reversal in a case where, by virtue of the rules of the court, the point was not raised timely. The record shows that although numerous attacks were made on the indictment, and one, indeed, touching the legality of the drawing of the jury lists, the complaint now urged was made in a motion for leave to file a supplemental motion to dismiss filed over nine months after arraignment (R. 2-3). Under Rule 92 of the Rules of the District Court for the District of Columbia, it was wholly discretionary with the court whether it would entertain such a motion at that time. See p. 3, *supra*.

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[2] As it is clear that the exclusions complained of in *Dow* v. *United States Steel Corp.*, 195 F. 2d 478 (C.A. 3), were of specific groups—foreign born, workers, veterans, and other classes similar to those involved in the Supreme Court cases cited, *supra*, p. 6—there is no basis for saying that *Dow* is in conflict with the decision below.

2. Petitioner also argues that it was reversible error for the prosecutor to comment to the jury in his closing argument that the grand jury did not believe the defendant when he appeared before it. This is said to have violated the rule that the indictment is not proof of the offense, transgressed the presumption of innocence which should continue throughout the trial, attacked improperly the defendant's credibility, and relied on grand jury proceedings which were not in evidence (Pet. 11).

The argument is unsound. It attaches too much weight to the prosecutor's closing statement, which the jury would necessarily accept as partisan. But more important, the court took great pains, in its charge, to point out the respective functions of the petit and grand juries, and specifically made the point that an indictment is not evidence (Tr. 1011-1014, 1023). The court also specifically pointed out that the jury was to bear in mind "that in a proceeding before the Grand Jury the individual in question is not represented by counsel (Tr. 1012)"; that the indictment is returned when the jury "concludes that presumably, probably, a crime may have been committed (Tr. 1013)," and that this is done for the purpose of indicating to the person charged "just exactly the nature and the character of the offense that he will have to interpose his defense against when the time comes to place him upon his trial before a jury of his peers, before a petit jury, before a trial jury such as you are" (Tr. 1013). No exception was taken (as is required by Rule 30 of the Federal Rules of Criminal Pro-

cedure,[3] if the objection is to be preserved), and no request for any additional charge was made; indeed, defense counsel indicated complete satisfaction with the charge (Tr. 1030).

Moreover, an argumuent referring to the grand jury's disbelief was not improper in this case since, unlike the cases on which petitioner relies (*Cooper* v. *United States*, 9 F. 2d 216 (C. A. 8); *United States* v. *Schanerman*, 150 F. 2d 941 (C. A. 2); *Nanfito* v. *United States*, 20 F. 2d 376 (C. A. 8); *Patterson* v. *United States*, 183 F. 2d 687 (C. A. 5)), it was legitimate comment on the evidence in the case. It was in evidence before the trial jury that petitioner had testified before the grand jury and had made the same denials there that he had made before the Senate committee. Much of his grand jury testimony was read in evidence to the trial jury by counsel for the prosecution and the defense (Tr. 770-774, 821-829, 855-857, 879-885, 886-887, 899-906, 981-985). It was thus obvious to the trial jury, from the evidence before them, including the effort of the defense to convince the trial jury that petitioner had made full and frank disclosures to the grand jury (see Tr. 761, 770-774, 788-793, 796-804, 819, 821-827), that the grand jurors did not believe petitioner's denials.

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[3] Rule 30 provides, in relevant part: "* * * No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objections. * * *"

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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